

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NORMAN WALTER HIRSCHER,

No. C-14-0340 EMC (pr)

Plaintiff,

v.

**ORDER OF SERVICE**

BRAD SMITH; *et al.*,

Defendants.

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**I. INTRODUCTION**

Norman Walter Hirscher, an inmate at San Quentin State Prison, filed this *pro se* civil rights action under 42 U.S.C. § 1983. His complaint is now before the Court for review pursuant to 28 U.S.C. § 1915A.

**II. BACKGROUND**

The amended complaint alleges the following:

From May 9, 2012 through June 6, 2012, Mr. Hirscher was in a work unit that was required to clean and/or work in an area containing lead paint and asbestos. Joe Dobie failed to provide Mr. Hirscher with “personal protective equipment during inventory.” Docket # 1 at 3. Mr. Dobie instructed Mr. Hirscher “to remove lead base[d] paint from the windows, and wall [panels] down to bare metal,” while others were power-washing pipes encased with asbestos. *Id.* Mr. Hirscher was not given proper training or protective gear to shield him against the asbestos and lead exposure in the CAL-PIA mattress and bedding factory at San Quentin. *Id.* at 3-4. Mr. Hirscher has several health problems resulting from his exposure to asbestos and lead paint.

1 PIA supervisor, Mr. Loreda, and PIA manager, Mr. Earley, intentionally attempted to  
2 minimize the severity of the exposure by failing to properly fill in worker's compensation forms that  
3 Mr. Hirscher had been exposed to asbestos. *Id.* at 4. Mr. Earley had put Mr. Dobie in charge as the  
4 supervisor of mattress and bedding, and Mr. Dobie was acting under and/or within Mr. Earley's  
5 authority when he ordered inmate employees to work under the hazardous conditions. *Id.* at 7.

6 K.A. Davis, a correctional officer, did security checks on the area between May 9, 2012  
7 through June 6, 2012. In response to Mr. Hirscher's question, C/O Davis said there was a "good  
8 possibility" that there was lead in the paint and asbestos in the pipe insulation. *Id.* at 13. C/O Davis  
9 also said he had notified Mr. Dobie and Mr. Young of the danger to the inmate workers.

10 On June 6, 2012, Mr. Hirscher and other inmates became aware of the hazardous materials  
11 based on a report and statements made by Luu Rogers, a maintenance supervisor who toured the  
12 area that day.

13 After learning of the contamination, Mr. Earley and Mr. Dobie failed to follow proper  
14 procedures for decontamination. The inmate-workers were allowed to shower but were not given  
15 clean clothes.

16 Jeremy Young, the supervisor of the CAL-PIA bedding and mattress department at San  
17 Quentin, notified his supervisor, Mr. Dobie, of a potential asbestos and lead paint danger in  
18 removing the paint and disturbing the insulation. After notifying Mr. Dobie, Mr. Young did nothing  
19 further to safeguard the inmate workers; in fact, he instructed Mr. Hirscher and other inmates to  
20 continue working, while he was aware of the risk to their health and safety. *Id.* at 10.

21 Several defendants took steps to deal with the situation on and after June 6, 2012. Elizabeth  
22 Babcock, a hazardous material specialist, identified asbestos and lead at the work site upon her  
23 arrival and immediately shut down the mattress and bedding factory. She then directed the prison  
24 officials to have the inmates evaluated for exposure to lead. B. Smith signed a form about the  
25 incident after the fact. Mr. Rogers contacted John Walker, the health and safety manager, who  
26 "contacted the necessary authorities to update them on the situation." *Id.* at 12.

### III. DISCUSSION

A federal court must engage in a preliminary screening of any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *See id.* at § 1915A(b). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated and (2) that the violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

Deliberate indifference to an inmate's health or safety violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A prison official violates the Eighth Amendment only when two requirements are met: (1) the deprivation alleged is, objectively, sufficiently serious, and (2) the official is, subjectively, deliberately indifferent to the inmate's health or safety. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Under the deliberate indifference standard, the prison official must not only "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," but "must also draw the inference." *Id.* at 837. Liberally construed, the amended complaint states a cognizable Eighth Amendment claim against defendants Dobie, Earley, Loreda and Young for permitting or requiring Mr. Hirscher to clean an area with lead paint and asbestos without adequate protective gear. *See Wallis v. Baldwin*, 70 F.3d 1074, 1076-77 (9th Cir. 1995) (requiring inmates to clean from attic material known to contain asbestos without protective gear demonstrated deliberate indifference).

Even with liberal construction, the amended complaint does not state a claim against C/O Davis, as the allegations against him do not suggest deliberate indifference. C/O Davis had informed the CAL-PIA supervisors of the risk of potential exposure to asbestos and lead paint in the area, and did not compel Mr. Hirscher to work in the area.

1 The amended complaint does not state a claim against the other defendants who stopped the  
2 work in the area on June 6, 2012 when they learned of the asbestos and lead paint problem. The  
3 bedding and mattress factory was deemed unsafe and was closed on June 6, 2012, according to the  
4 complaint. The defendants who took steps on and after June 6, 2012 to stop the work and write  
5 reports about it after the fact are not liable for deliberate indifference to Mr. Hirscher's safety for the  
6 already-completed exposure to the toxic substances.

7 Any mishandling or failure to grant Mr. Hirscher's inmate appeals in the prison  
8 administrative appeal system does not amount to a due process violation. There is no federal  
9 constitutional right to a prison administrative appeal or grievance system for California inmates. *See*  
10 *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir.  
11 1988); *Antonelli v. Sheahan*, 81 F.3d 1422, 1430 (7th Cir. 1996) (prison grievance procedure is  
12 procedural right that does not give rise to protected liberty interest requiring procedural protections  
13 of Due Process Clause); *Smith v. Noonan*, 992 F.2d 987, 989 (9th Cir. 1993). Prison officials are not  
14 liable for a due process violation for simply failing to process an appeal properly or failing to find in  
15 Mr. Hirscher's favor.

16 Plaintiff alleges several state law claims. It appears that some or all of these may be barred  
17 by the rule that the workers' compensation system is the exclusive remedy of an employee for an  
18 industrial injury. *See* Cal. Labor Code § 3600 *et seq.* The defendants being served must address the  
19 state law claims in their answer and/or dispositive motions.

#### 20 IV. CONCLUSION

21 1. The amended complaint states a cognizable § 1983 claim against Joe Dobie, Philip  
22 Earley, Gary Loreda, and Jeremy Young for a violation of Plaintiff's Eighth Amendment rights.

23 2. The Clerk shall issue a summons and the United States Marshal shall serve, without  
24 prepayment of fees, the summons, a copy of the second amended complaint and a copy of all the  
25 documents in the case file upon the following defendants, who apparently work in the Prison  
26 Industries section of San Quentin State Prison.

- 27 - Joe Dobie (CAL-PIA)
- 28 - Philip Earley (CAL-PIA)
- Gary Loreda (CAL-PIA)

1 - Jeremy Young (CAL-PIA)

2 3. In order to expedite the resolution of this case, the following briefing schedule for  
3 dispositive motions is set:

4 a. No later than **September 12, 2014**, Defendants must file and serve a motion  
5 for summary judgment or other dispositive motion. If Defendants are of the opinion that this case  
6 cannot be resolved by summary judgment, Defendants must so inform the Court prior to the date the  
7 motion is due. If Defendants file a motion for summary judgment, Defendants must provide to  
8 Plaintiff a new *Rand* notice regarding summary judgment procedures at the time they file such a  
9 motion. *See Woods v. Carey*, 684 F.3d 934, 939 (9th Cir. 2012). If Defendants file a motion to  
10 dismiss for non-exhaustion of administrative remedies, Defendants must provide to Plaintiff a notice  
11 regarding motions to dismiss for non-exhaustion procedures at the time they file such a motion. *See*  
12 *Stratton v. Buck*, 697 F.3d 1004, 1008 (9th Cir. 2012).

13 b. Plaintiff's opposition to the summary judgment or other dispositive motion  
14 must be filed with the Court and served upon Defendants no later than **October 10, 2014**. Plaintiff  
15 must bear in mind the notice and warnings regarding summary judgment provided later in this order  
16 as he prepares his opposition to any motion for summary judgment.

17 c. If Defendants wish to file a reply brief, the reply brief must be filed and  
18 served no later than **October 24, 2014**.

19 4. Plaintiff is provided the following notices and warnings about the procedures for  
20 motions for summary judgment:

21 The defendants may make a motion for summary judgment by which  
22 they seek to have your case dismissed. A motion for summary  
23 judgment under Rule 56 of the Federal Rules of Civil Procedure will,  
24 if granted, end your case. . . . Rule 56 tells you what you must do in  
25 order to oppose a motion for summary judgment. Generally, summary  
26 judgment must be granted when there is no genuine issue of material  
27 fact -- that is, if there is no real dispute about any fact that would  
28 affect the result of your case, the party who asked for summary  
judgment is entitled to judgment as a matter of law, which will end  
your case. When a party you are suing makes a motion for summary  
judgment that is properly supported by declarations (or other sworn  
testimony), you cannot simply rely on what your complaint says.  
Instead, you must set out specific facts in declarations, depositions,  
answers to interrogatories, or authenticated documents, as provided in  
Rule 56(e), that contradict the facts shown in the defendants'

1 declarations and documents and show that there is a genuine issue of  
2 material fact for trial. If you do not submit your own evidence in  
3 opposition, summary judgment, if appropriate, may be entered against  
4 you. If summary judgment is granted, your case will be dismissed and  
there will be no trial. *Rand v. Rowland*, 154 F.3d 952, 962-63 (9th  
Cir. 1998).

5 If a defendant files a motion for summary judgment for failure to exhaust administrative remedies,  
6 he is seeking to have the case dismissed. As with other defense summary judgment motions, if a  
7 motion for summary judgment for failure to exhaust administrative remedies is granted, your case  
8 will be dismissed and there will be no trial.

9 5. All communications by Plaintiff with the Court must be served on a defendant's  
10 counsel by mailing a true copy of the document to the defendant's counsel. The Court may  
11 disregard any document which a party files but fails to send a copy of to his opponent. Until a  
12 defendant's counsel has been designated, Plaintiff may mail a true copy of the document directly to  
13 the defendant, but once a defendant is represented by counsel, all documents must be mailed to  
14 counsel rather than directly to that defendant.

15 6. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No  
16 further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16 is required  
17 before the parties may conduct discovery.

18 7. Plaintiff is responsible for prosecuting this case. Plaintiff must promptly keep the  
19 Court informed of any change of address and must comply with the Court's orders in a timely  
20 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant  
21 to Federal Rule of Civil Procedure 41(b). Plaintiff must file a notice of change of address in every  
22 pending case every time he is moved to a new facility.

23 8. Plaintiff is cautioned that he must include the case name and case number for this  
24 case on any document he submits to the Court for consideration in this case.

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1           9.       Plaintiff's motion to compel Defendants to answer his complaint is DENIED. Docket  
2 # 2. If Defendants want to file an answer they may, but they also are permitted by statute to file a  
3 waiver of reply instead of an answer. *See* 42 U.S.C. § 1997e(g).  
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5           IT IS SO ORDERED.  
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7       Dated: July 31, 2014  
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EDWARD M. CHEN  
United States District Judge